

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**





74-1436

IN THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

SAMUEL H. SLOAN,  
SAMUEL H. SLOAN & CO.,

Defendants-Appellants.

Appeal from the United States District Court  
for the Southern District of New York

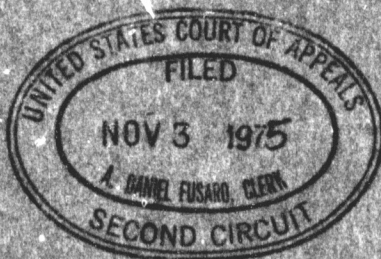
ANSWERING BRIEF OF THE SECURITIES  
AND EXCHANGE COMMISSION, APPELLEE

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ANSWERING BRIEF OF THE SECURITIES  
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COUNTERSTATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Were the district court's findings clearly erroneous that a broker-dealer violated the book-keeping and net capital requirements of the federal securities laws, which findings were based upon testimony at trial by securities investigators of the Securities and Exchange Commission who had made numerous inspections of the appellants' books and records and prepared numerous capital computations therefrom?

COUNTERSTATEMENT OF THE CASE

This is an appeal from the decision of the district court, rendered on January 7, 1974, permanently enjoining Samuel H. Sloan & Co., a registered broker-dealer in securities, and its proprietor, Samuel H. Sloan, from further violations of the book-keeping and net capital requirements of the federal securities laws.

This action is the seminal case in a web of litigation involving Mr. Sloan and the Securities and Exchange Commission. <sup>1/</sup> Despite the array of proceedings spawned by this initial enforcement action taken by the Commission against Mr. Sloan and despite the profusion of legal theories propounded by Mr. Sloan in an endless stream of motions made before this Court and before various district judges of the Southern District of New York, the substance of the case at bar could not be more

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1/ In addition to this appeal, Mr. Sloan and the Commission are adversaries before this Court in four other matters: Securities and Exchange Commission v. Samuel H. Sloan, individually and d/b/a Samuel H. Sloan & Co., No. 75-7056 (appeal from a subsequent preliminary injunction); Securities and Exchange Commission v. Canadian Javelin, Ltd., et al., No. 75-7046 (Mr. Sloan's application for intervention to assert a claim for damages); Samuel H. Sloan v. Securities and Exchange Commission, et al., No. 75-7283 (appeal by Mr. Sloan from dismissal of his suit against the Commission and others seeking declaratory, injunctive and damage relief); Samuel H. Sloan v. Securities and Exchange Commission, No. 75-4087 (Mr. Sloan's petition for review of the Commission's order barring him from association with any broker-dealer and revoking the broker-dealer registration of Sloan & Co.). A fifth proceeding Samuel H. Sloan v. Securities and Exchange Commission, No. 74-2457 (Mr. Sloan's petition for review of a series of trading suspensions) was dismissed without prejudice on October 15, 1975.



routine. Investigators in the Commission's New York Regional Office, after examinations of the books and records of Samuel H. Sloan & Co., then a registered broker-dealer operated by Mr. Sloan as a sole proprietorship, observed that the firm's books and records were not maintained in accordance with the Commission's regulations and, further, that the firm was not in compliance with the Commission's net capital requirements for broker-dealers. Accordingly, the Commission instituted this injunctive action in the United States District Court for the Southern District of New York.

The Commission's Complaint, filed on June 17, 1971, alleged that Samuel H. Sloan & Co., aided and abetted by its proprietor, Samuel H. Sloan, had violated Section 15(c)(3) of the Securities Exchange Act, 15 U.S.C. 78o(c)(3) and Rule 15c3-1 promulgated thereunder, 17 C.F.R. 240.15c3-1 (net capital rule); Section 15(b)(1) of the Securities Exchange Act, 15 U.S.C. 78o(b)(1) (broker-dealer registration); and Section 17(a) of the Securities Exchange Act, 15 U.S.C. 78o(c)(3), and Rules 17a-3 and 17a-4 thereunder, 17 C.F.R. 240.17a-3, 17a-4 (book-keeping rules). In addition to an injunction against further violations, the Commission sought the appointment of a temporary receiver for the assets of Sloan & Co. (Appendix, pp. 2-11)(hereinafter App. \_\_\_\_).

On June 23, 1971, the parties appeared before Judge McLean on the Commission's motion for a preliminary injunction. <sup>2/</sup> At that time, Mr. Sloan agreed to the entry of a preliminary injunction by consent against further violations of the net capital and book-keeping rules. Moreover, Mr. Sloan agreed to retain a certified public accountant acceptable to the Commission who would prepare an audit of the financial position of Sloan & Co. as of June 30, 1971, the results to be submitted to the Commission by July 31, 1971. (App. 47-51). <sup>3/</sup> Accordingly, the Commission did not press its application for the appointment of a receiver for the assets of Sloan & Co.

Mr. Sloan executed the consent to the preliminary injunction "without admitting or denying the allegations set forth in the Complaint" (App. 52).

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2/ On June 21, 1971, Judge McLean had entered an order temporarily restraining further violations of the Commission's net capital and book-keeping requirements. That order further restrained defendants, pending the Commission's application for appointment of a receiver, from "directly or indirectly transferring, liquidating, pledging or otherwise disposing of any assets of the defendant Samuel H. Sloan & Co. (with the exception of completion of transactions already committed) until such time as Sloan & Co. should be in compliance with the book-keeping and net capital provisions. (App. 22-25).

3/ Mr. Sloan also consented to an order requiring him to file an amendment to his broker-dealer registration clarifying the initial capitalization of Sloan & Co. (App. 51).



That consent further recited that "[n]o tender, offer, promise or threat of any kind whatsoever [had] been made by plaintiff Securities and Exchange Commission, or any member, officer, agent or representative thereof, in consideration of the foregoing consent" (App. 52). The order was entered on June 24, 1971.

The Commission's action had been commenced on the basis of a series of inspections by the Commission's securities investigators of the books and records of Sloan & Co. which disclosed numerous book-keeping and net capital violations. In January, 1971, the initial inspection of Sloan & Co. was undertaken by Arthur Bruder of the Commission's New York Regional Office. He determined that as of January 15, 1971, Mr. Sloan's general ledger was not in order; cash receipts and disbursements had not been maintained properly; the customers' ledger had not been maintained; lists of fails-to-receive and fails-to-deliver were not properly maintained; nor were income and expense items and capital accounts properly maintained (Transcript of Trial, pp. 479-480) (hereinafter Tr. \_\_\_\_). Mr. Bruder requested that Mr. Sloan provide him with a trial balance for Sloan & Co. On January 18, 1971, Mr. Sloan submitted what was purported to be a trial balance. But, as Mr. Bruder testified at trial, the document was incomplete in that it did not have a schedule of fails-to-deliver and fails-to-receive nor did it include an inventory of the firm's trading account. Accordingly, on the basis of Mr. Sloan's submissions, Mr. Bruder was unable to make a capital computation for the firm. On January 25, Mr. Bruder visited the Offices of Sloan & Co., prepared a capital computation and deter-

mined that Sloan & Co. had an adjusted net capital deficiency of \$28,016 as of January 18. <sup>4/</sup>

On February 25, 1971, Mr. Bruder again extracted a trial balance from the books and records of the firm as of January 29, 1971. The result of that capital analysis was a net capital deficiency of \$11,912 (Tr. 485). <sup>5/</sup>

On March 19, 1971, Mr. Sheldon Kanoff, also a securities investigator in the Commission's New York Regional Office, examined the books and records of Sloan & Co. and determined that those books and records inaccurately reflected a capital contribution of \$58,000 from a Mr. Joseph Iny, when, in fact, Mr. Iny was a customer of the firm rather than a capital contributor.

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<sup>4/</sup> Mr. Bruder explained his computation at trial. Sloan & Co. had a net capital deficit of 14,666. After various adjustments including the "haircut" (a deduction to allow for market fluctuations in securities held) the adjusted net capital was \$23,016. The total deficiency was that amount plus the \$5,000 minimum requirement imposed upon broker-dealers by the Commission's Rules at that time (Tr. 483).

<sup>5/</sup> Mr. Bruder testified at trial that Sloan & Co. at that date showed a net capital of \$12,909. From this Mr. Bruder deducted \$10,000 as an unconfirmed gift. Mr. Sloan had indicated to Mr. Bruder that his mother, Mrs. Majorie Sloan, had given \$10,000 to the firm. Mr. Bruder wrote to Mrs. Sloan to confirm that and received no reply. He subsequently telephoned Mrs. Sloan and was told by her that she had not made a gift of \$10,000 (Tr. 485-486). Thus the adjusted net capital of the firm was \$2,090. After the "haircut" the adjusted net capital was a deficit of \$6,912. Adding the \$5,000 minimum required capital, Sloan & Co. was out of capital compliance by \$11,912 (Tr. 485).



The \$58,000 were funds deposited by Mr. Iny for the purchase of Kaiser Steel securities and should have been carried as such in his account. <sup>6/</sup>

(Tr. 144-147, 199). Accordingly, when Mr. Kanoff prepared a capital computation the \$58,000 was treated as a liability rather than a capital item (Tr. 39, 199) with the result that Sloan & Co. showed a net capital deficiency as at February 26, 1971, of \$15,961 (Tr. 40).

On April 8, 1971, Mr. Kanoff visited the offices of Sloan & Co. for the purpose of examining the firm's books and records. Mr. Kanoff discovered that a complete set of books and records was not available. The only available records were machine-run debit and credit slips from which the information required by the Commission's book-keeping rules could not be obtained (Tr. 49-50). Mr. Kanoff noted evidences of active securities trading by the company (Tr. 50).

On May 6, 1971, Mr. Kanoff again went to Sloan & Co. in an attempt to see documentation which would verify a trial balance for the firm as of March 31, 1971. He was unable to obtain the necessary documents (Tr. 52). Subsequently

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<sup>6/</sup> The Kaiser securities involved were shown in the trading account of Sloan & Co. rather than in a customer account for Mr. Iny (Tr. 144).

Mr. Kanoff requested a trial balance for Sloan & Co. as of May, 1971, and never received it (Tr. 53). <sup>7/</sup>

Subsequent to the entry of the preliminary injunction by consent on June 24, 1971, and pursuant to its terms, Sloan & Co. submitted a trial balance with supporting documents as of June 30, 1971, prepared by Sloan & Co.'s certified public accountant who had been retained in accordance with the consent decree. The results of that computation showed a net capital deficit of \$19,221 (Tr. 56). Mr. Kanoff arrived at substantially the same result and, allowing for the \$5,000 minimum net capital required by the Commission calculated a capital deficiency for Sloan & Co. of \$24,200.

Following the entry of the preliminary injunction against Mr. Sloan and Sloan & Co., the staff of the Commission's New York Regional Office continued to scrutinize the activities of Sloan & Co. At trial Mr. Sloan objected to evidence of any conduct which occurred subsequent to the filing of the Commission's Complaint (Tr. 59). But the Commission's counsel pointed out that evidence of subsequent violations was being offered to show that there were continual violations and, hence, the need for perma-

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<sup>7/</sup> Mr. Sloan has made much of a controversy with respect to an April trial balance. The Commission initially alleged that no April 30, 1971, trial balance had been submitted by Sloan & Co. After a search of the files made during the trial at Judge Ward's request, the document was discovered and produced in court (Tr. 352). The date stamp on the trial balance was May 20, 1971; supporting schedules were stamped as received on June 18, 1971. Thus, the documents would have been meaningless in any attempt by Mr. Sloan to establish that his books and records were maintained in a timely fashion. Nevertheless, the Commission withdrew its proposed finding that "a trial balance requested for Sloan & Co. for the end of April, 1971, was never submitted to the Commission." No finding of violation by the district court is based upon that item.



ment injunctive relief. The district court over-ruled Mr. Sloan, noting that "an equity court will look to events which occur subsequent to the filing of the Complaint" (Tr. 60).

Thus, the record reflects persistent violations of both the book-keeping and net capital rules continuing until late in 1973. These violations are cumulative and were presented for the purpose of demonstrating the need for permanent injunctive relief. Accordingly, a detailed account of each and every violation is unnecessary to sustain the judgment below. A few examples should illustrate the point.

(1) On August 12, 1971, Mr. Kanoff visited Sloan & Co. to examine its books and records. He observed that the books were posted only as of July 31, 1971, and determined through observation of recently dated confirmations that the firm was actively engaged in trading (Tr. 66-68). In addition, the firm's trading inventory submitted to the Commission for August, 1971, was inaccurate in that it reflected securities in the Sloan & Co. inventory which had actually been transferred to another brokerage firm (Tr. 77-78, 342-344).

(2) The Commission's investigators testified that Sloan & Co. was in net capital deficiency as of the following dates: July 31, 1971 (Tr. 62), August 31, 1971 (Tr. 69), September 30, 1971 (Tr. 71), October 8, 1971 (Tr. 76), November 30,

1971 (Tr. 79), and December 31, 1971 (Tr. 83).

(3) By Mr. Sloan's admission, a trial balance submitted by Sloan & Co. to the Commission as at August 2, 1973, did not disclose numerous trades in the securities of Canadian Javelin, Ltd. (Tr. 290-291), and failed to disclose that shares of Canadian Javelin had been borrowed by Sloan & Co. and were, in fact, owed to other broker-dealers (Tr. 300-305). Partially as a result of these Canadian Javelin transactions, Sloan & Co. had a net capital deficiency of 20,046 as of August 2, 1973 (Tr. 401-402).<sup>8/</sup>

(4) On August 16, 1973, Mr. Appoldt of the Commission's staff visited Sloan & Co. to inspect the firm's capital computations. Mr. Sloan did not furnish the necessary books and records but indicated that he would take them to the Commission's New York Regional Office. Mr. Sloan failed to appear and when Mr. Kanoff and a Commission staff attorney returned to Sloan & Co., Mr. Sloan could not produce the requested capital computations (Tr. 407).

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<sup>8/</sup> While Mr. Sloan, in his brief at p. 47, states that "all of Appoldt's [a member of the Commission's staff] testimony concerning Sloan's supposed failure to disclose trades was stricken by the Court, the Court actually struck only a portion of Mr. Appoldt's testimony on the matter -- a portion which involved hearsay accounts of a third party's knowledge (Tr. 400-401). The district judge noted Mr. Sloan's own testimony on the subject of borrowed Canadian Javelin stock. Mr. Sloan's own testimony fully supports the district court's findings on this matter.



The district judge expressly found that during the period from January, 1971, through January 31, 1972, Sloan & Co. continued to effect transactions in securities (App. 96). But that is not disputed. Mr. Sloan testified that he had conducted business throughout 1971 (Tr. 211-212). Furthermore, Mr. Sloan testified that "during the period of 1972 through the middle of 1973 it was my custom to put an average of between 100 and 150 cards in the Pink Sheets every day. In view of the large quantity of stocks that I listed from [sic] the pink sheets every day over a long period of time, I simply can't recall a specific card . . . ." (Tr. 222-223).

Beginning in February, 1973, a series of four pre-trial conferences were held by Judge Robert J. Ward, attended by counsel for the Commission and by counsel for Mr. Sloan and Sloan & Co. (App. 81). <sup>9/</sup> In the interim between the entry of the preliminary injunction and the initiation of these conferences the Commission, on April 25, 1972, had instituted public administrative proceedings against Mr. Sloan and Sloan & Co. to determine whether the broker-dealer registration of Sloan & Co. should be revoked and whether Mr. Sloan should be barred from association with broker-dealers. From October 30 through November 1, 1972, a hearing was held in that proceeding,

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<sup>9/</sup> Due to the death of Judge Mclean who had entered the preliminary injunction in this action, the case had been reassigned to Judge Ward.

which was based upon allegations of substantially the same violations as are alleged in this injunctive action. On April 25, 1973, the Administrative Law Judge filed his initial decision in which he concluded that "the record of the registrant and Sloan, as evidenced by the violations found in the proceeding, reflect an unwillingness or a lack of capacity to operate as a broker-dealer in conformity with applicable law and regulations." (App. 80-81). <sup>10/</sup>

On June 8, 1973, Mr. Sloan, through his counsel, filed a discovery motion in this action, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, seeking to compel the Commission to produce its copy of the transcript of that administrative proceeding. That motion was denied by Judge Ward on August 16, 1973 (App. 56-61). <sup>11/</sup> The district judge concluded that "discovery need not be required of documents of public record which are equally available to all parties," (App. 59) and that "to grant Sloan's motion would in the future allow all respondents in administrative proceedings, regardless of how many parties may be involved, to obtain a copy of the transcript on motion, thereby requiring the Commission to purchase additional copies of the transcript and placing an undue burden on the Commission" (App. 996).

On October 25, 1973, Mr. Sloan filed a motion (1) to dismiss or in the alternative to vacate the preliminary injunction; (2) to stay the

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<sup>10/</sup> The Commission subsequently affirmed the Administrative Law Judge's determination, revoked the registration of Sloan & Co. and barred Mr. Sloan from association with any broker or dealer on April 28, 1975. A petition for review of that order is pending before this Court, No. 75-4087.

<sup>11/</sup> The opinion is reported at 369 F. Supp. 994 (S.D. N.Y., 1973).



effectiveness of any order which might issue as a result of the Commission's administrative proceeding; (3) for various kinds of discovery; and (4) for costs (App. 62-63). All of these motions were denied by Judge Ward on November 20, 1973 (App. 80-89).

A full trial on the merits of the Commission's claim for permanent injunctive relief was held on December 11, 12, 13, 20 and 21, 1973. <sup>12/</sup>

On January 7, 1974, the District Judge issued his findings of fact and concluded that "the issuance of a permanent injunction [was] necessary to protect the public against the continuation or repetition of the above described violations and, unless permanently enjoined there is a likelihood that the defendant will continue to engage in violations of the Exchange Act and the Rules promulgated thereunder." (App. 97-98).

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<sup>12/</sup> The proceeding was adjourned for one week after the Commission had presented its case in order to give Mr. Sloan additional time in which to prepare.

ARGUMENT

- I. THE DISTRICT COURT'S FINDINGS ARE NOT CLEARLY ERRONEOUS AND FULLY SUPPORT ITS CONCLUSIONS WITH RESPECT TO VIOLATIONS BY THE DEFENDANTS.

At trial members of the Commission's staff testified at length with respect to specific instances in which the books and records of Sloan & Co. were examined and found not to be maintained in conformity with Commission rules (Tr. 49-50, 52-53, 66-68, 77-78, 144-147, 342-344, 479-480). These staff members also testified in great detail, supported by exhibits, with respect to specific instances in which Sloan & Co. was in net capital deficiency (Tr. 40, 56, 62, 69, 761, 765, 401-402, 483, 485). If there was ever any doubt that Sloan & Co. was doing business during the relevant periods, these doubts are dispelled by Mr. Sloan's own testimony (Tr. 211-213, 222-223). On this record it cannot seriously be contended that Judge Ward's findings of violations are clearly erroneous. <sup>—</sup>/

The deference shown to a trial judge who sits as the trier of fact is reflected in this Court's decision in United States, ex rel. Fitzgerald v. LaVallee, 461 F. 2d 601, 604 (C.A. 2, 1972):

" . . . We frankly state that we have difficulty in fathoming the process of appraisal that persuaded the able district judge to reach the opposite conclusion. . . . However, there was evidence to support the finding . . . which cannot be dismissed as insubstantial. Since the credibility of Fitzgerald's

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13/ Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part:

" . . . Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . . ."



testimony and the weight to be extended to it were matters to be determined by the trial judge, who observed the witnesses, we cannot say that the findings were clearly erroneous, doubtful as we may be as to whether any other judge would under all the circumstances have extended much, if any, credibility or weight to it, or reached the same result." (Citations omitted.)

Based upon the findings here, the district judge correctly concluded that Sloan & Co., under the direction of Mr. Sloan, had wilfully violated Section 17(a) of the Securities Exchange Act, 15 U.S.C. 78q(a), and Rules 17a-3 and 17a-4 thereunder, 17 C.F.R. 240.17a-3 and 17a-4, in that the firm had failed properly to maintain, keep current and preserve certain of its books and records. The district court was also correct in its determination that the firm, under Mr. Sloan's direction, had wilfully violated Section 15(c)(3) of the Securities Exchange Act, 15 U.S.C. 78o(c)(3), and Rule 15c3-1 promulgated thereunder, in that the firm had effected transactions in securities otherwise than on a national securities exchange at a time its net capital was less than the required minimum.

Upon these findings and conclusions, the district court properly entered a permanent injunction, concluding that such relief was "necessary to protect the public against the continuation or repetition of the above described violation" and that "unless permanently enjoined, there [was] a likelihood that the defendants [would] continue to engage in violations of the Exchange Act and the Rules promulgated thereunder." (App. 97-98). Securities and Exchange Commission v. Shapiro, 494 F. 2d 1301, 1308 (C.A. 2, 1974); Securities and Exchange Commission v. Manor Nursing Centers, Inc., 458 F. 2d 1082, 1100 (C.A. 2, 1972); Securities and Exchange Commission

v. Culpepper, 270 F. 2d 241, 249-250 (C.A. 2, 1959).<sup>14/</sup>

II. THE OTHER ARGUMENTS PRESENTED BY THE APPELLANT ARE  
EQUALLY WITHOUT SUBSTANCE.

1. "The prosecution of this case is an abuse of the judicial process." (Br. 14-27).

Mr. Sloan, among other things, asserts that he was coerced into a preliminary injunction by consent (Br. 20) when, in fact, he signed a statement specifically stating that "no tender, offer, promise or threat of any kind whatsoever [had] been made by [the Commission] in consideration of this consent" (App. 52).

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<sup>14/</sup> The permanent injunction entered clearly was set forth with sufficient particularity to satisfy the requirements of Rule 65 of the Federal Rules of Civil Procedure as well as to put the defendants upon notice of what conduct was proscribed. (App. 100-101).

Defendants were permanently enjoined from

- (1) " . . . making use of the mails or means or instrumentalities of interstate commerce to effect any transactions in or to induce or to attempt to induce the purchase of securities while registered with the Commission as a broker-dealer in securities
- (a) while and at a time when the aggregate indebtedness of defendant Sloan & Co. or any other registered broker-dealer of which defendant Sloan becomes a principal or controlling person, to all other persons exceeds two thousand (2,000) per centum of its net capital . . . ;
- (b) while and at a time the adjusted net capital . . . is less than a minimum as required by the Net Capital Rule of the Securities Exchange Act of 1934 . . . ; and
- (c) while and at a time when defendant's books and records . . . are not made, kept and maintained pursuant to Section 17(a) of the Securities Exchange Act of 1934 . . . and Rules 17 C.F.R. 240.17a-3 and 17a-4 thereunder."



Relying upon Far East Conference v. United States, 342 U.S. 570 (1952), Mr. Sloan asserts that the Complaint should have been dismissed as soon as the Commission instituted its administrative proceeding. That case held that in a totally different regulatory scheme agency expertise should be brought to bear upon certain issues prior to judicial determination. To the contrary, the Securities Exchange Act expressly provides for separate injunctive and administrative remedies. See Sections 15(b)(5) and 21(e), 15 U.S.C. 78o(b)(5) and 78u(e). Indeed, a prior injunction may be used as the basis for an administrative proceeding. See Section 15(b)(5), 15 U.S.C. 78o(b)(5).

2. "This action should have been dismissed, for failure to prosecute" (Br. 28-29).

There is a certain irony in this argument in that this appeal has previously been dismissed (but subsequently reinstated) because of Mr. Sloan's failure to prosecute.

Whether to dismiss for failure to prosecute is plainly within the discretion of the district court. Mr. Sloan moved the district court to do so and the district court responded that "Sloan's unsupported argument that the action should be dismissed for failure to prosecute is without merit." (App. 84).

3. "The Complaint failed to state a claim upon which relief may be granted." (Br. 29-32).

As the district judge noted in denying Mr. Sloan's motion to dismiss on this ground, "The claim on which this request for relief is based

is that Sloan endangered the investing public by operating the firm of Sloan & Co. in violation of the federal securities laws" (App. 82). Congress has expressly provided a judicial remedy for such a claim. Securities Exchange Act, Section 21(e), 15 U.S.C. 78u(e)

4. "The District Court failed to give the defendant a fair and impartial trial." (Br. 34-37).

Mr. Sloan complains that Judge Ward "paced the floor with hands clasped behind his back" (Br. 34), "came down from the bench and stomped around the courtroom while Sloan was testifying" (App. 34) and often "bared his teeth" (App. 34). Mr. Sloan concedes that these matters are not disclosed in the record, which he ascribes to "the inherent inadequacies of appellate review" (Br. 35).

In a trial which occupied five days of the district court's time, Judge Ward was well within his discretion in moving the questioning forward as quickly as possible; and after adjourning for a full week for Mr. Sloan's convenience, Judge Ward acted properly in denying a further continuance--particularly in view of the fact that the trial date had been set months in advance. The district judge also appropriately exercised his discretion in refusing to permit Mr. Sloan to call the Commission's trial counsel, to call Judge Duffy and to call the Administrative Law Judge, who had heard the Commission's proceeding against Mr. Sloan, as witnesses.

5. "Sloan is entitled to a hearing on his charges of fraud and misconduct on the part of the S.E.C. staff." (Br. 68-69).

Mr. Sloan's brief on this point makes no mention of any concrete act of fraud or of misconduct. After the trial below, Mr. Sloan moved for relief



Judge Ward also properly rejected Mr. Sloan's "general shotgun approach" (Tr. 284) to discovery at trial. Mr. Sloan had sought, among other things, "the confidential file of Samuel Sloan and all papers, records, internal memoranda and work sheets prepared by plaintiff" (Tr. 284). In rejecting this broad request Judge Ward correctly stated (Tr. 285):

"Well, I would suggest, Mr. Sloan, that they are attorneys work product, the confidential and investigative report to the extent they are internal and probably could not be subpoenaed."

At that point Mr. Sloan made a request for matters which he would be "at the receiving or delivering end of" and specifically for an April 30 trial balance which he had delivered to the Commission (Tr. 285). Judge Ward directed the Commission to produce the April trial balance (Tr. 285). He also directed the Commission to turn over to Mr. Sloan:

"All correspondence between the Commission and Mr. Sloan and between the Commission and Mr. Sloan's attorneys. . . . Any application filed by Mr. Sloan will be also available to him except that if there are any confidential recommendation or investigative reports thereon, which have been appended to the material, they will not be made available to him." (Tr. 432).

These directions by the district judge were complied with, and Mr. Sloan was given a week after the Commission rested its case to use the material in the preparation of his case.

Mr. Sloan requested that the Commission produce a deposition given by Mr. Joseph Iny which had not been filed with the court (Tr. 287), and Judge Ward directed that it be produced (Tr. 288). But the court quite properly declined to compel production of private investigative transcripts of Mr. Iny's testimony before Commission investigators unless and until the

from judgment on the ground of fraud on the part of the Commission's staff. Judge Ward, on submissions by the parties, rejected the assertion of fraud. It is well established that such a determination is within the sound discretion of the trial court. Nederlandsche Handel-Maatschappij, N.V. v. Jay Emm, Inc., 301 F. 2d 114, 115 (C.A. 2, 1962); Divito v. Fidelity Deposit Co. of Md., 361 F. 2d 936, 938 (C.A. 7, 1966); Atchison, T. & S.F. Ry. Co. v. Barnett, 246 F. 2d 846, 849 (C.A. 9, 1957).

6. "The defendants-appellants are entitled to an award of costs including reasonable attorneys fees." (Br. 69).

Section 27 of the Securities Exchange Act, 15 U.S.C. 78aa, provides:

"No costs shall be assessed for or against the Commission in any proceedings under this Chapter brought by or against it in the Supreme Court or such other courts."

7. "The District Court erred in denying the motions and requests for discovery and the production of documents." (Br. 32).

In a reported decision, 369 F. Supp. 994 (S.D. N.Y., 1973), Judge Ward held that Mr. Sloan could not discover from the Commission a copy of the transcript of the administrative proceeding instituted by the Commission against Mr. Sloan. The district judge noted that the transcript could have been ordered by Mr. Sloan from the reporting service just as the Commission had done; the district judge also noted that Mr. Sloan had made no showing of inability to pay for a transcript, and properly determined that a decision to permit such discovery would unduly burden the Commission and would set a precedent for it being subjected to similar requests for transcripts from any and all parties in its administrative proceedings. (App. 56-61).



Commission should call him as a witness (Tr. 288). Mr. Sloan's contention Br. 33) that production of the Iny investigative testimony should have been compelled, pursuant to the Jencks Act, 18 U.S.C. §3500, because he intended to call Mr. Iny as a witness, is erroneous. Assuming the Jencks Act is applicable to civil actions, it only requires "the Government to turn over to the defense prior statements of Government witnesses." United States v. Wright, 489 F. 2d 1181, 1189 (C.A. D.C., 1973). The court's order to produce the district court deposition was complied with.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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October 1975.



OFFICE OF THE  
GENERAL COUNSEL

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

November 3, 1975

A. Daniel Fusaro, Esquire  
Clerk, United States Court of Appeals  
for the Second Circuit  
United States Courthouse  
Foley Square  
New York, New York 10007

Re: Securities and Exchange Commission v. Samuel H. Sloan, Samuel  
H. Sloan & Co., No. 74-1436

Dear Mr. Fusaro:

Enclosed for filing are twenty-five copies of the Commission's  
answering brief.

I certify that I have served by mail two copies of the foregoing  
upon the appellant, Samuel H. Sloan, at 917 Old Trents Ferry Road,  
Lynchburg, Virginia 24503.

Very truly yours,

Thomas L. Taylor III  
Attorney

